No. 12-485

In the Supreme Court of the United States

DONALD GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner's co-defendant refused to testify at petitioner's trial, invoking his Fifth Amendment privilege against compelled self-incrimination, but asserted after trial that he would provide exculpatory testimony if petitioner's motion for a new trial were granted. The question presented is whether the co-defendant's proffered testimony constitutes "newly discovered evidence" warranting a new trial under Federal Rule of Criminal Procedure 33.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2012 WL 3009462. The order of the district court (Pet. App. 7a-9a) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted in 391 Fed. Appx. 311.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2012. The petition for a writ of certiorari was filed on October 16, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of carjacking, in violation of 18

U.S.C. 2119; one count of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c); and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). He was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2a. The court of appeals affirmed, 391 Fed. Appx. 311, and this Court denied a petition for a writ of certiorari, 131 S. Ct. 1058 (2011). Petitioner then filed a motion for a new trial under Federal Rule of Criminal Procedure 33, which the district court denied. Pet. App. 7a-9a. The court of appeals affirmed. *Id.* at 1a-6a.

1. As he left his residence to go to work in the early morning hours of October 31, 2007, Tom Brantley observed three men sitting inside a parked gray Acura Legend. See 391 Fed. Appx. at 313. The two passengers, whose faces were covered, approached Brantley, and the taller of the two pointed a handgun at him, seized his key chain, and hit him in the head. After taking Brantley's three cell phones and $20 in cash, the two men forced Brantley into his house where they stole an additional $800 and a pair of blue Air Jordan shoes. See *ibid.* They then proceeded to steal Brantley's two cars: The shorter male robber left in Brantley's M45 Infiniti, and the taller one left in Brantley's white ML320 Mercedes-Benz. The driver of the Acura, who remained in the car during the robbery and was later identified as Darrick Fraling, fled in the Acura. See *ibid.*

Brantley's mother called 911 to report the robbery, and, a few minutes later, two Baltimore City police officers observed petitioner, Fraling, and a shorter man standing near the stolen vehicles, with the Acura nearby. 391 Fed. Appx. at 313-314. Petitioner was holding a black object that looked like a handgun. As soon as the

police officers identified themselves, petitioner threw the object into the Mercedes, and the three men fled. See *id.* at 314. Petitioner and Fraling were apprehended a short time later, but the third individual, who was described as much shorter than petitioner, escaped. See *ibid.* When he was detained, petitioner was carrying approximately $800 in cash, Brantley's three cell phones, and the key to the stolen Mercedes. The police also found a handgun on the front seat of the Mercedes and a box of Air Jordan shoes in the Infiniti. See *ibid.*

2. Petitioner was indicted in the United States District Court for the District of Maryland on one count of carjacking, in violation of 18 U.S.C. 2119; one count of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c); and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). Fraling was also charged in the indictment with counts of carjacking and using a firearm during the carjacking. They each elected to proceed with a jury trial in July 2008.

On the third day of trial, Fraling pleaded guilty pursuant to a plea agreement and a stipulated statement of facts. Fraling admitted that he and two accomplices had participated in a carjacking on October 31, 2007; that he had remained in the Acura while his two accomplices forced the victim at gunpoint to turn over his money and the keys to a Mercedes SUV and an Infiniti; that the police had identified Fraling "and the two accomplices" on the street standing near the Acura and the victim's stolen cars; that the three men had fled when the police had approached them; and that Fraling had been arrested with one of the accomplices, but that the third man had escaped. Gov't C.A. Br. 2-3.

After the district court accepted Fraling's guilty plea, petitioner's counsel advised the district court of his intention to call Fraling as a defense witness. In response to the district court's inquiry, Fraling told the court that he would invoke his Fifth Amendment right not to testify. Gov't C.A. Br. 6.

Petitioner testified at trial that he did not participate in the carjacking. He claimed that, as he was walking to work, he had observed Fraling and two other men (supposedly named "Ronnie" and "Stefan") throwing objects out of vehicles and that "Stefan" had told petitioner he could have the cell phones. Petitioner testified that though he then retrieved the cell phones and a set of car keys from the street, he had not taken possession of any cash or a handgun. Three of petitioner's relatives testified for the defense to corroborate aspects of petitioner's testimony. 391 Fed. Appx. at 315-316.

The jury convicted petitioner on all three counts, and he was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2a. The court of appeals affirmed, 391 Fed. Appx. 311, and this Court denied a petition for a writ of certiorari, 131 S. Ct. 1058 (2011).

3. In February 2011, petitioner's counsel sent a letter to Fraling stating that he was preparing a motion for a new trial and asking Fraling how he would testify if he were called as a witness. Gov't C.A. Br. 6. Fraling, who was still serving a term of imprisonment, replied with a declaration stating that he would testify that "[petitioner] did not take part in the October 31, event that me and two other individuals took part in." Pet. App. 10a.

On July 15, 2011—more than two and a half years after Fraling pleaded guilty—petitioner filed a motion for a new trial under Federal Rule of Criminal Procedure

33. See Fed. R. Crim. P. 33 ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. * * * Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."). The motion claimed that petitioner was entitled to a new trial based on the "newly discovered evidence" in Fraling's declaration. The district court denied the motion, concluding that Fraling's declaration did not constitute newly discovered evidence under Rule 33. Pet. App. 7a-8a; Gov't C.A. Br. 6-7.

4. The court of appeals affirmed. Pet. App. 1a-6a. It held that Fraling's proffered testimony was not "newly discovered" within the meaning of Rule 33 because petitioner was aware of Fraling's testimony at the time of trial and had attempted to call him as a witness. *Id.* at 3a. Fraling's previous invocation of his right against compelled self-incrimination and his subsequent willingness to testify, the court explained, did "not transform Fraling's single-sentence declaration into newly discovered evidence." *Id.* at 4a. It observed that the "overwhelming majority" of other circuits had also concluded that Rule 33 does not authorize a new trial on the basis of a co-defendant's testimony that was known at the time of trial but unavailable because the co-defendant invoked the Fifth Amendment privilege. *Ibid.* (citing cases from the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits). The court of appeals declined to adopt the approach of the First Circuit, which, in certain narrow circumstances, permits a district court to grant a new trial on the basis of such testimony. *Id.* at 5a.

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in holding that under Federal Rule of Criminal Procedure 33, Fraling's testimony was not "newly discovered evidence." That claim lacks merit because the evidence from petitioner's co-defendant may have been newly available, but it was not newly discovered, as Rule 33 requires. Petitioner further contends that the court of appeals' holding conflicts with the First Circuit's decision in *United States* v. *Montilla-Rivera*, 115 F.3d 1060 (1997). Although, in certain "unusual circumstances," the First Circuit has permitted defendants to assert Rule 33 motions based on the testimony of co-defendants who invoked the Fifth Amendment privilege at trial, *id.* at 1067-1068, petitioner could not prevail under that exacting standard. This case, therefore, does not present a suitable vehicle to resolve the narrow conflict between the First Circuit and the ten other circuits to consider the issue. Further review is not warranted.[1]

1. The court of appeals correctly held that Fraling's proffered testimony did not constitute "newly discovered evidence" under Rule 33.

a. Rule 33 authorizes a district court to grant a new trial "if the interest of justice so require." The rule requires that a motion for a new trial "grounded on newly discovered evidence" be filed within three years "after the verdict or finding of guilty." When considering motions for new trials based on newly discovered evidence, courts generally require the defendant to show that the evidence: (i) is newly discovered and was unknown at the time of trial; (ii) could not have been uncovered earlier

[1] This Court has previously denied petitions raising the same conflict. See *Jasin* v. *United States*, 537 U.S. 947 (2002) (No. 01-10649); *Cunningham* v. *United States*, 526 U.S. 1003 (1999) (No. 98-724).

though the exercise of due diligence by the defendant; (iii) is not merely cumulative or impeaching; (iv) is material to the issues involved; and (v) will probably produce an acquittal. See Pet. App. 2a; see also 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 584, at 451-455 (4th ed. 2011).

In this case, the court of appeals correctly determined that Fraling's proffered testimony was not newly discovered evidence. Petitioner knew about Fraling during trial and sought to call him as a witness to offer the same exculpatory evidence that he now claims is "newly discovered." See Pet. App. 3a. As the court of appeals explained, "[t]he fact that Fraling invoked his Fifth Amendment right against self-incrimination and refused to testify during [petitioner's] trial, but approximately two and one half years later expressed his willingness to do so[,] does not transform Fraling's single-sentence declaration into newly discovered evidence." *Id.* at 4a. Under the "plain and unambiguous term 'newly discovered evidence,'" evidence that the defendant was aware of before trial "cannot be newly discovered after such trial." *Id.* at 5a.

That conclusion was sound. "One does not 'discover' evidence after trial that one was *aware of* prior to trial," and "[t]o hold otherwise stretches the meaning of the word 'discover' beyond its common understanding." *United States* v. *Owen*, 500 F.3d 83, 89-90 (2d Cir. 2007), cert. denied, 552 U.S. 1237 (2008). Fraling's testimony was not newly *discovered* evidence, but rather evidence that was newly *available* once Fraling was sentenced and no longer intended to invoke his Fifth Amendment privilege. Pet. App. 3a. The "unambiguous language of Rule 33," however, "says nothing about newly available

evidence." *United States* v. *Jasin*, 280 F.3d 355, 368 (3d Cir.), cert. denied, 537 U.S. 947 (2002).

The court of appeals' interpretation of Rule 33 comports with the holdings of the "overwhelming majority" of circuits that have considered the question. Other circuits have almost uniformly held that "when a defendant is aware of the substance of exculpatory testimony that a codefendant could provide during the defendant's trial, the codefendant refuses to testify at the defendant's trial by invoking the Fifth Amendment, and, post-trial, the codefendant expresses a willingness to testify, the codefendant's potential testimony is not newly discovered evidence within the meaning of Rule 33." Pet. App. 4a (citing cases from the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits); see also *United States* v. *Lofton*, 333 F.3d 874, 875-876 (8th Cir. 2003); *United States* v. *Dale*, 991 F.2d 819, 839 & n.42 (D.C. Cir.), cert. denied, 510 U.S. 906, and 510 U.S. 1030 (1993).

As even petitioner acknowledges, "weighty" considerations support the requirement that evidence justifying a new trial be newly discovered and not merely newly available because a co-defendant no longer has a reason to invoke the Fifth Amendment privilege. Pet. 5. A co-defendant who has already been convicted and sentenced has "nothing to lose" by offering testimony that exonerates a former confederate, *United States* v. *Freeman*, 77 F.3d 812, 817 (5th Cir. 1996), and, therefore, such testimony is "untrustworthy and should not be encouraged," *United States* v. *Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.), cert. denied, 506 U.S. 890 (1992). And as the district court observed, "[i]ncreasingly, pressure is being placed upon inmates to prove to their fellow inmates that they have not cooperated," and

"cooperators are retaliated against by fellow inmates." Pet. App. 7a-8a. Permitting a defendant to secure a new trial based on the post-trial testimony of a co-defendant would "provide defendants with an incentive to obtain—by the exercise of pressure [on] a co-defendant—an affidavit declaring the innocence of the defendant procuring the affidavit." *Id.* at 8a.

b. Petitioner argues (Pet. 5) that courts have "not distinguish[ed] between 'newly discovered' and 'newly available' testimony for witnesses other than co-defendants." Pet. 5. He misreads the cases he cites, each of which was issued by a circuit that has rejected petitioner's position on the question presented. In *United States* v. *Fulcher*, 250 F.3d 244 (4th Cir.), cert. denied, 534 U.S. 939 (2001), for example, an agent with the Drug Enforcement Administration recalled *new* information after trial that cast doubt upon the accuracy of his trial testimony. *Id.* at 247-250. The defendant's Rule 33 motion was therefore based on new evidence entirely unknown to the defense at trial, not previously known evidence that a witness had withheld on privilege grounds. Evidence that a government investigator recalls from memory only after trial might reasonably be thought to fall within the term "newly discovered evidence." The same cannot be said for Fraling's decision only after trial to testify about a matter—the identity of his accomplices—that he surely recalled at the time of trial.

The other cited cases are equally inapposite. In *United States* v. *Garland*, 991 F.2d 328 (6th Cir. 1993), a witness could not be "located until after the trial" because he "was in Cameroon at the time of the trial and had no contact with [the defendant] or his attorneys." *Id.* at 335. And in *United States* v. *Ouimette*, 798 F.2d

47 (1986), cert. denied, 488 U.S. 863 (1988), the Second Circuit agreed with the government that the witness's "proposed testimony * * * [was] not new, since [he] told [the defendant's] counsel a similar story three weeks before the trial," but found that defense counsel could not have discovered before trial the alleged fact that the witness had been coerced by police officers into refusing to testify. *Id.* at 51. Neither of those decisions supports the view that potential testimony by a co-defendant that the defendant was aware of before trial —such as whether the defendant participated in the crime—is "newly discovered" merely because the co-defendant invoked the Fifth Amendment privilege not to testify. Indeed, the Second Circuit has explained that *Ouimette* "clearly indicates the opposite." *Owen*, 500 F.3d at 89 n.2; see also *ibid.* ("*Ouimette* does not support the proposition that testimony the defendant was aware of prior to or during trial, but only became available after trial, is newly discovered evidence within the meaning of Rule 33.").

2. Petitioner argues (Pet. 4-5) that this Court should grant review to resolve a division of authority between the First Circuit and the ten circuits that have adopted the interpretation of Rule 33 applied by the court of appeals below. Although petitioner is correct that the First Circuit has allowed a small window for a defendant to obtain a new trial based on a co-defendant's previously known testimony, this case is not a suitable vehicle to resolve the narrow circuit conflict because petitioner could not prevail even under the First Circuit's standard.

In *United States* v. *Montilla-Rivera*, 115 F.3d 1060 (1997), the First Circuit held that the post-trial exculpatory testimony of the defendant's two co-defendants

might warrant a new trial. *Id.* at 1065-1066. *Montilla-Rivera* made clear that proffers of "new" evidence by co-defendants must be viewed "with great skepticism," *id.* at 1066, and stated that it "share[d] the general skepticism concerning those statements" expressed by other courts, *id.* at 1067. Like the circuits that have adopted the majority rule, the First Circuit noted that "[a] convicted, sentenced codefendant has little to lose (and perhaps something to gain) by such testimony." *Id.* at 1066. It concluded, however, that "the better rule is not to *categorically* exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong [of the new-trial test] but to consider it, *albeit with great skepticism*, in the context of all prongs." *Ibid.* (emphases added).

Applying that stringent standard, the First Circuit concluded that in light of the "unusual combination of circumstances" present in that case—including "the weakness of the government's case"—the co-defendants' statements warranted a hearing at which the district court could decide whether to grant a new trial. *Montilla-Rivera*, 115 F.3d at 1067. But it cautioned that its rule "by no means confers any automatic right * * * to a new trial or even to a hearing." *Ibid.* On remand, in fact, the district court denied the defendant's motion for a new trial, and the First Circuit affirmed. See *United States* v. *Montilla-Rivera*, 171 F.3d 37, 39, 42 (1999). The First Circuit has subsequently emphasized that post-trial declarations from co-defendants "must be regarded with 'great skepticism'" and that the decision in *Montilla-Rivera* turned on the unusual circumstances in that case. *United States* v. *Del-Valle*, 566 F.3d 31, 39 (1st Cir. 2009) (quoting *Montilla-Rivera*, 115 F.3d at 1066).

This case "does not present the same sort of 'unusual circumstances' that animated [the] decision in *Montilla-Rivera*," *Del-Valle*, 566 F.3d at 39, and thus petitioner would not have prevailed even if his case had arisen in the First Circuit. Unlike that case, in which the evidence against the defendant came from a single informant, see 115 F.3d at 1067, the overwhelming evidence against petitioner came from multiple sources. That evidence included the testimony of two police officers who apprehended petitioner moments after he and the others had stolen the two cars, petitioner's possession of items stolen from the victim moments earlier, and petitioner's behavior when confronted by the police. See 391 Fed. Appx. at 313-314, cert. denied, 131 S. Ct. 1058 (2011). Given that evidence, petitioner could not satisfy the exacting standard set forth in *Montilla-Rivera*.

Petitioner himself acknowledges that there are "various facts that would weigh against [petitioner] under a discretionary analysis." Pet. 7. He argues, however, that this Court should not wait for an appropriate vehicle to address the question presented because defendants in the ten circuits that have foreclosed Rule 33 motions based on previously known testimony by co-defendants are unlikely to raise it. See Pet. 7-8. Defendants, however, regularly challenge settled circuit precedent in an effort to obtain en banc or certiorari review. The fact that nearly every circuit has rejected petitioner's interpretation of Rule 33 provides no reason for this Court to grant review in a case in which the defendant could not prevail even under the First Circuit's outlier position.

3. Even if petitioner could satisfy the first prong of the Rule 33 standard, further review of this case would be unwarranted because, largely for the reasons that

petitioner could not prevail under the First Circuit's standard, he cannot satisfy the other prongs. In particular, petitioner has no realistic possibility of demonstrating that Fraling's testimony would likely result in an acquittal on retrial in light of the other evidence against petitioner. It is especially unlikely that a jury would place any weight on Fraling's testimony given that it flatly contradicts the admissions in his plea agreement. That agreement stated that Fraling and "one accomplice" had been arrested while the third accomplice had escaped, consistent with the police officers' testimony about their encounter with petitioner, Fraling, and the third man. See *United States* v. *Ebron*, 683 F.3d 105, 158 (5th Cir. 2012) (given inconsistencies between co-conspirator's factual statement in support of his guilty plea and subsequent affidavit, no "reasonable jury would place any weight on [the co-conspirator's] affidavit"), petition for cert. pending, No. 12-6956 (filed Oct. 24, 2012). Moreover, Fraling's proffered testimony does not admit facts that actually corroborate petitioner's version of events, undermining whatever probative value it might otherwise have.

In light of the overwhelming evidence against petitioner, Fraling's inconsistent post-hoc testimony would not lead a reasonable jury to acquit. Thus, even a favorable resolution of the question presented would lack any practical value for petitioner because the district court on remand would be compelled to deny his Rule 33 motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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